

APR 6 1978

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-910

GOVERNMENT OF THE VIRGIN ISLANDS and
LEROY A. QUINN, Commissioner of Finance,

Petitioners,

v.

VITCO, INC.,

Respondent.

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

IVE SWAN

Attorney General

ARTHUR POMERANTZ

Assistant Attorney General

Department of Law

P.O. Box 280

St. Thomas, Virgin Islands 00801

CHARLES S. RHYNE

WILLIAM S. RHYNE

DONALD A. CARR

Suite 800

1000 Connecticut Ave., N.W.

Washington, D.C. 20036

CHARLES H. BURTON

CARL F. BAUERSFELD

7101 Wisconsin Avenue

Bethesda, Maryland 20014

Attorneys for Petitioners

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-910

GOVERNMENT OF THE VIRGIN ISLANDS and
LEROY A. QUINN, Commissioner of Finance,
Petitioners,

v.

VITCO, INC.,
Respondent.

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Because it was judicial error for the Court below to deny to the Virgin Islands tax revenues Congress plainly meant for the Virgin Islands to receive, it is a judicial responsibility to correct that error. It would be no remedy to refer the Virgin Islands back to Congress or to the Internal Revenue Service.

The petition for certiorari in this case was filed December 23, 1977. On February 21, 1978, the Court entered an order inviting the Solicitor General to file a brief expressing the views of the United States. That brief was filed on March 23, 1978.

The Solicitor General agrees with Petitioner Virgin

Islands that the decision below is clearly erroneous, and that it will have an adverse impact upon the fiscal stability of the Government of the Virgin Islands. The Solicitor General urges, however, that the question involved does not warrant review by this Court. He says that the Virgin Islands can obtain relief by getting the United States Treasury to "amplify" the regulation which the Court of Appeals below wrongly thought applicable, or by persuading Congress to "clarify" the Virgin Islands' right to receive the taxes in issue. (Brief for the United States at 7-8).

The Solicitor General wholly overlooks the fact that whatever the appropriateness¹ or feasibility of such recourse might otherwise be, any corrective change to Treasury

¹In *City of Lafayette v. Louisiana Power & Light Co.*, 46 U.S.L.W. 4265, 4270 (March 29, 1978), this Court rejected a similar argument that a Court be permitted to vitiate Congress' clear expression on the matter there in litigation in favor of reliance for remedy on the "vagaries of the political process" in the legislatures. Here, too, the Congress has spoken and should not be compelled to speak again to undo the interpretive evil of the decision of the Court of Appeals below.

Regulations,² the Code³ or the Virgin Islands Organic Act will undoubtedly be of prospective effect only. If the decision of the Third Circuit is not reversed the Virgin Islands will be subject to refund suits⁴ for the amount of the tax in issue collected in all prior open years, and will not be able to enforce outstanding deficiency notices for amounts due for those years. The revenues lost to the Virgin Islands will be at least \$18,000,000 to \$20,000,000, a devastating

²The Commissioner of Internal Revenue of course has discretion, pursuant to Section 7805(b) of the Code, to decide whether an "amplification" of Treasury Regulation 1.1441-4(d) should be retroactive, but there will be no way for the Virgin Islands to challenge a decision by him that any change should be prospective only. If this Court allows the Third Circuit's judgment to stand, such a decision by the Commissioner would hardly be an abuse of his discretion. Cf. *Dixon v. United States*, 381 U.S. 68, 76; *Automobile Club of Michigan v. Commissioner*, 353 U.S. 180, 184-86.

³Certainly, Congress will defer to judicial ruling on the proper interpretation of existing law, making any change prospective only. For example, in *Chicago Bridge and Iron Co. v. Wheatley*, 430 F.2d 973 (3d Cir. 1970), *cert. denied*, 401 U.S. 910, the Third Circuit held that the Virgin Islands could not deny to a United States corporation the "Western Hemisphere trade corporation" deduction available to it on a United States tax return. Congress thereafter eliminated the Western Hemisphere trade corporation deduction for purposes of application of the Internal Revenue Code in the Virgin Islands, thus in Respondent's words, "legislatively overruling *Chicago Bridge*." (Respondent's Brief In Opposition at 6, n.8.) However, the amendment was made effective only with respect to taxable years beginning after the date of its enactment, because Congress deferred to the Courts "as to what constitutes the appropriate interpretation of existing law. . ." H. Rep. No. 92-533, 92d Cong., 1st Sess. 50 (1971); S. Rep. No. 92-437, 92d Cong., 1st Sess. 71 (1971).

⁴In excess of \$10,000,000 in claims for refunds and interest have already been filed by taxpayers identically situated with Respondent Vitco, Inc. In excess of \$3,000,000 is subject to pending deficiency proceedings.

sum to a Government whose annual budget is less than \$140,000,000 and whose fiscal position is already precarious. (Petition for Certiorari at 5-7).

Petitioners submit that, given the United States' position on the merits of this case, the appropriate disposition would be for this Court to enter an Order granting certiorari and summarily reversing the judgment of the Court of Appeals below. The only suitable alternative is full review on certiorari of the plainly erroneous decision of the Third Circuit.

Respectfully submitted,

CHARLES S. RHYNE
WILLIAM S. RHYNE
DONALD A. CARR

Suite 800

1000 Connecticut Avenue, N.W.

Washington, D. C. 20036

CHARLES H. BURTON
CARL F. BAUERSFELD
7101 Wisconsin Avenue
Bethesda, Maryland 20014

Attorneys for Petitioners

IVE SWAN

Attorney General

ARTHUR POMERANTZ

Assistant Attorney General

Department of Law

P. O. Box 280

St. Thomas, Virgin Islands 00801